No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, JR., as special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

ANSWERING BRIEF OF McCLINTIC-MARSHALL COMPANY

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PRELIMINARY STATEMENT

This appeal is concerned chiefly and primarily with the establishment of three alleged mortgage liens, known generally to the parties as the $70,000, or Penn Mutual mortgage, the $750,000 or Purchase Money mortgage, and the $600,000 or Metro-

politan Life mortgage. Underlying the separate consideration of these alleged incumbrances is the question of the identity of the two corporations, Scandinavian American Building Company and Scandinavian American Bank of Tacoma. If they are identical, then, as forcibly stated by the Honorable T. L. Stiles in the brief filed by him on the appeal of Ben Olson Company, the obligations created in the name of or resting upon the property of the Building Company were the liabilities of the bank, and the attempt to enforce them in this proceeding is an attempt by an owner to establish and enforce a lien upon his own property.

The facts and argument establishing such identity are so clearly and conclusively set forth by Judge Stiles in the brief referred to (see Brief of Ben Olson Co. pp. 47 to 72) that we shall neither repeat them nor attempt to elaborate thereon. Suffice it to say that we believe that the argument made on behalf of the Supervisor to the effect that the corporations were separate entities is very completely answered, and the converse indisputably established. With the permission of Judge Stiles we therefore ask leave to adopt that portion of his brief as our own. In so doing we do not want to give the impression that we believe the proposition to be of minor importance. On the contrary we are convinced that it is sound and conclusive of the main features of this appeal. We desire merely to avoid what would be poor repetition, at the best.

Similarly the Honorable R. S. Holt is filing a brief in answer to that filed by the Commissioner. This brief deals thoroughly and convincingly with the legal propositions involved in the claims asserted upon said mortgage. We have had the opportunity and benefit of reading it in manuscript, and with Mr. Holt's permission ask leave to adopt that brief also, as our argument upon the questions therein considered. However, owing to the size of the record upon this appeal and the involved state of facts, it is conceived that possibly some assistance can be rendered to this court by a separate brief dealing almost exclusively with the details and the inferences to be drawn therefrom. The main propositions of law need no further elaboration.

In addition to the argument upon these three mortgages the Commissioner in a most cursory manner attacks the District Court's ruling upon the arbitration clause contained in the McClintic-Marshall contract. As that question, however, has been thoroughly discussed in our brief in answer to the opening brief of the Receiver of the Building Company, we shall not repeat it here, but ask the court to refer to our other brief.

In fine, it is the intent to confine this brief to an answer to the assertions of fact relating to the three mortgages, made by counsel for the Commissioner, and to mention legal propositions only incidentally for the sake of clarity, or continuity, or to show the connection with the propositions

discussed by Mr. Holt. In so doing we shall treat the bank and the Building Company as separate and distinct corporations, but without in any way conceding that they are in law or equity separate entities.

ARGUMENT

The Status of Bank Commissioner or Bank Supervisor

It is asserted by counsel for the Bank Commissioner that the Commissioner was not an agent of the bank, but an officer of the State of Washington, all of which is immaterial if true. We are here concerned, not with his status, but with the condition of the bank's assets in his hands. Are they charged with the same equities, liens, incumbrances, and obligations as when being administered by the bank, or does the taking over of the bank by the Commissioner wipe out all previously existing rights, and obligations, legal or equitable, contractual or otherwise, with respect to such property as was taken over by the Bank Commissioner? To state this proposition is to answer it.

Hanson vs. Soderberg, 105 Wash. 255; 177 Pac. 827, so greatly relied upon by the appellants, is to our way of thinking utterly beside the point, since the court was there considering solely the power of the Commissioner or Supervisor "to make an assessment upon the stockholders without a judicial inquiry and determination as to the necessity for such assessment." It was not concerned with the con-

dition of any property of the bank which passed into the hands of the Supervisor or Commissioner upon his taking over the bank, but solely with the super-added liability of the bank's stockholders, created by statute and made a live question when the Commissioner or Supervisor took charge. Such superadded liability was not an asset in the hands of the bank.

On the other hand, the real point involved here is ruled by the decision of the Supreme Court of the State of Washington in *Moore vs. American Savings Bank & Trust Co.*, 111 Wash. 148, 189 Pac. 1010. The following quotation from the opinion rendered in that case will suffice to show its pertinency.

> "The insolvency of the bank and the taking possession by the Examiner could not destroy nor affect this lien. He would take possession of the bank subject to all equities and rights existing in any one else. In 34 Cyc. at page 193, it is said:
>
> " 'The general rule is that a receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds it in the hands of the person or corporation out of whose possession it is taken.' In 23 R. C. L., at page 56, it is said:
>
> " 'A receiver holds the property coming

into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment. He becomes merely the assignee of the insolvent, and has exactly the same rights.'" (111 Wash. pp. 158 and 159.)

That, with respect to the assets coming into his hands from the bank, as distinguished from the moneys received by him as a result of an assessment levied upon the stockholders, the Commissioner's functions as a receiver follows also from section 3269 of Remington's 1922 Compiled Statutes (quoted as section 3268 on page 42 of appellant's brief) as follows:

"Upon taking possession of any bank or trust company, the examiner shall proceed to collect the assets thereof, and to preserve, administer and liquidate the business and assets of such corporation. With the approval of the superior court of the county in which such corporation is located, he may sell, compound or compromise bad or doubtful debts and upon such terms as the court shall direct sell all real estate and personal property of such corporation. He shall deliver to each purchaser an appropriate deed or other instrument of title. If real estate is situated outside of said county, a certified copy of the orders authorizing and confirming the sale thereof shall be filed for record in the office

of the auditor of the county in which such property is situated. He may appoint special deputy examiners and other necessary agents to assist in the administration and liquidation of such corporation, a certificate of such appointment to be filed with the clerk of the county in which such corporation is located. He shall require each special deputy to give a surety company bond, conditioned as he shall provide, the premium of which shall be paid out of the assets of such corporation. He may also employ an attorney for legal assistance in such administration and liquidation. (L. '17, p. 301, sec. 62. Cf. L. 1915, p. 280, sec. 3.)"

On the theory now advanced by the Commissioner, we inquire what was the occasion or necessity for applying to the Superior Court of the State of Washington for authority "to take up by assignment or otherwise" the $70,000 mortgage. Yet the Commissioner, just as any receiver would have done, applied to the court for authority and direction in this matter. (See Order, Exhibit No. 335, Tr. p. 1217.)

Commissioner's Intention in Taking Assignment of $70,000 Mortgage

It is asserted that there was no intention to pay this mortgage, and discharge the lien thereof. (Appellant's brief, p. 65 et seq.) Yet the trial court found otherwise as follows:

> "Mr. Haskell, the Receiver of the bank—not as Receiver of the Building Company, acquired a note and mortgage of the Building Company for $70,000. This mortgage was outstanding at the time the various contracts relating to the construction of the building were made. The Receiver's purpose was to protect the property from foreclosure of the underlying mortgage, and in form it was a purchase by him.
> * * *
>
> "The bank's Receiver in taking up this mortgage was merely seeking to prevent the further increase of claims against the trust estate in his hands which, if suffered, would result in the dilution of the assets, and could not but prejudice the depositors and other creditors of the bank. Under these circumstances to hold the bank's receiver's action, in taking up the underlying mortgage, a purchase whereby he escaped liability upon the warranty, and also secured a position of advantage where he could defeat the lien claimants, not only has no equity in it, but would be highly inequit-

able." (Memorandum Decision, Tr. pp. 442 and 443.)

This finding is conclusive here.

Butte Copper Co. vs. Clark Montana Realty Co., 248 Fed. 609 (C. C. A. 9th Cir.);

Vandervort vs. Bishop, 199 Fed. 420 (C. C. A. 9th Cir.);

Thorndyke vs. Alaska Mining Co., 164 Fed. 657 (C. C. A. 9th Cir.);

Idaho Mining & Milling Co. vs. Davis, 123 Fed. 396 (C. C. A. 9th Cir.).

The original building project contemplated that the bank should transfer or procure to be transferred to the Building Company lots 10, 11 and 12 in block 1003, New Tacoma, free and clear of incumbrance, that the Building Company should execute a first mortgage thereon of $600,000, which it was intended would be placed in the east, that it would be taken by the Metropolitan Life Insurance Company; that the Building Company should thereafter—within four months of February 10, 1920—execute a second mortgage upon the said premises securing a bond issue of $750,000, and that $350,000 of such bonds should be delivered to the bank as consideration for the three lots. (See Exhibits 181, Tr. p. 1005, and 184, Tr. p. 1020; testimony of Larson, Tr. p. 1084.) In furtherance of this scheme the bank procured conveyance to the Building Company of lot 10 from Drury the Tailor, and paid therefor $65,000, and itself conveyed by

full warranty deed the other two lots. The intention of the bank to pay and discharge the $70,000 Penn Mutual mortgage then existing as evidenced by the warranty deed, persisted as late as September, 1920, as witness Larson's taking a check east with which to pay off this mortgage. (Tr. pp. 1047, Cf. Statement of Nov. 30, 1920, wherein appears "Mortgages Payable, $70,000"; Exh. 349, Tr. p. 1238.) In other words the consideration for that $350,000 of the second mortgage bonds was the bank's delivery to the Building Company of the three lots, free and clear of incumbrance, which in turn included the payment to Drury the Tailor and the discharge of the $70,000 mortgage. It follows, therefore, that the intention to enforce the mortgage securing the $350,000 bonds cannot legally or equitably exist along with the intent to enforce the $70,000 mortgage. The right to the bonds depends upon the extinguishment of the mortgage. The deed by which the bank conveyed lots 11 and 12 was in form a statutory warranty deed, which imports a covenant that the premises are free and clear of all incumbrance. This covenant was breached the moment the deed was delivered, irrespective of the due date of the $70,000 mortgage.

7 R. C. L. Covenants, sec. 79, p. 1164;
15 C. J. Covenants, secs. 63 & 109, pp. 1247 & 1271.

Yet when the Order, Exhibit 335, was sought by

the Commissioner or his Special Deputy, the idea was obviously to preserve the property and to protect the security underlying the second mortgage bonds, and the intention then unquestionably was to enforce that latter security. The foreclosure of that second mortgage was sought in the court below, and is sought here. (See appellant's brief, p. 157, et seq.) The intention to seek relief under the bond issue denies any intent to enforce the $70,000 mortgage. The two cannot exist at the same time.

In the light of the avowed intention as to the purchase money mortgage, and the maxim that "equity treats as done that which ought to be done", the appellants are estopped to assert that the $70,-000 mortgage was not discharged. Under the original arrangement made under the warranty deed given, the bank ought to have discharged the Penn Mutual mortgage before becoming entitled to the bonds. It or its successor in interest, the Commissioner, has taken an assignment of this mortgage when a release ought to have been procured. In equity under the maxim referred to the lien of the $70,000 mortgage has been extinguished.

At the risk of unnecessary repetition we assert that the original plan of this building scheme was that the Building Company should have these three lots subject to two mortgages,—the one for $600,-000, the second for $750,000. The position of the Commissioner is that the property is subject not

only to these two mortgages, but to the $70,000 Penn Mutual mortgage, and to a liability for the $65,000 paid Drury the Tailor as well.

Moreover, as more fully developed by Mr. Holt, this is not a case calling for the searching out of the actual intent existing at the time of the transactions, but rather one where the Commissioner will be presumed to have intended the legal consequences of his act.

Obligation as to $70,000 Mortgage

Will all due deference to counsel for the Bank Commissioner we respectfully assert that they confuse in their argument under this heading the bank's obligation to the original mortgagee and its obligations to the Building Company. We may concede that the bank in its dealings with the Penn Mutual Life Insurance Company was meticulously careful that no direct obligation should be imposed upon it to pay the mortgage. It held the lots subject to that mortgage, but scrupulously avoided, in outward show at least, any assumption thereof. But when the bank came to deal with the Building Company the situation changed. It conveyed lots 11 and 12 by a warranty deed, conforming to the statutory requirements of such deeds in the state of Washington. (See Exhibit 325, Tr. p. 1194.) The effect of such deed is defined by the Washington statute as follows:

"Warranty deeds for the conveyance of land

may be substantially in the following form:

"The grantor (here insert the name or names and place of residence) for and in consideration of (here insert consideration), in hand paid, convey and warrant to (here insert the grantee's name or names) the following described real estate (here insert description), situate in the county of ....., State of Washington.

"Dated this ..... day of ....., 18..

..... (Seal)

"Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor:

"1. That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple in and to the premises therein described, and had good right and full power to convey the same;

"2. That the same were then free from all encumbrances; and

"3. That he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same; and such covenants shall be obligatory upon any grantor, his heirs and

personal representatives, as fully and with like effect as if written at full length in such deed." Remington 1922 Compiled Statutes, sec. 10552.

The covenants imported into this deed impose an obligation upon the bank to discharge the then existing Penn Mutual mortgage.

"Under the deed containing covenants of general warranty, after its delivery, it was the grantor's duty to pay the outstanding incumbrance. Until such incumbrance was paid or satisfied she was personally liable under her covenant of warranty. *Mickels vs. Townsend*, 18 N. Y. 575. She could not take an assignment of such outstanding incumbrance to herself without it operating as a discharge of such mortgage assigned, regardless of her intent in the matter. If she intended the assignment as such, it operated as a satisfaction of the mortgage, and, of course, if it was intended to be a satisfaction instead of an assignment, and the money was paid to the mortgagee to satisfy the mortgage, the same was thereby satisfied. See *Kelley vs. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Brown vs. Lapham*, 3 Cush. (Mass.) 551; *Putnam vs. Collamore*, 120 Mass. 454; *Frey vs. Vanderhoof*, 15 Wis. 397; *Shirk vs. Whitten*, 131 Ind. 455, 31 N. E. 87; *Caley vs. Morgan*, 114 Ind. 350; 16 N. E. 790; *Burnham vs. Dorr*, 72 Me. 198; *Clay vs. Banks*, 71 Ga. 363; *Butler vs. Seward*, 10 Allen (Mass.)

466; *Kneeland vs. Wood*, 138 Mass. 198; *Bank vs. Sloan*, 97 Iowa 183, 66 N. W. 91; *Bank vs. Burnes*, 87 Pa. 491; *Converse vs. Cook*, 8 Vt. 164; *Zimpleman vs. Veeder*, 98 Ill. 613; *Sandwich Co. vs. Zellmer*, 48 Minn. 408; *Yerkes vs. Hadley*, 5 Dak. 324, 40 N. W. 340, 2 L. R. A 363; *Clark vs. Baker*, 14 Cal. 633, 76 Am. Dec. 449."

Sommers vs. Wagner, 131 N. W. 797, at p. 799.

See also:

Smith vs. Hogue, 123 N. W. 827.

That obligation followed the bank's assets into the hands of the Commissioner and stood in the way of his enforcement of the Building Company's agreement to give the bonds. So he discharged this obligation to protect and preserve the assets in his own hands and to enable him to enforce them for the benefit of the bank's creditors and stockholders. Our respect for the acumen of the Deputy Bank Supervisor in charge of the liquidation of the Scandinavian American Bank of Tacoma and for his counsel impel the belief that the statement on page 77 of their brief is deliberate camouflage. They say:

"The Bank Commissioner was under the positive duty of administering the funds of the bank for the benefit of all creditors of the bank and was without right or authority to pay off this mortgage which would result to the benefit

of the creditors of the Building Company and to the detriment of the creditors of the bank."

The facts are that the Commissioner did not pay off this $70,000 mortgage, intending or knowing that it would result to the benefit of the creditors of the Building Company, and to the detriment of the creditors of the bank. He was advised and believed that he held prior liens upon the Building Company property which the $70,000 mortgage jeopardized, and he discharged that mortgage to preserve his own lien for the benefit of the bank's creditors. Because events have proven his belief as to the priority of his liens erroneous does not change the nature of his acts, the intent with which they were performed, nor the legal effect thereof. Even if he knew his incumbrances to be subordinate to those of the lien claimants it does not follow that his acts were not honestly intended and calculated to benefit the bank's creditors. The $70,000 mortgage concededly was first. Everything saved thereon increased the salvage for the holders of the junior incumbrances. Wherever the Commissioner's liens ranked the amount saved on the $70,000 mortgage was earned for them, unless the lien claims intervened and took all, but until the Commissioner's present brief was written he has always asserted that the property was worth at least $450,000, more than ample to discharge all of the lien claims. His error, if any, was in placing too high a value upon the property.

On pages 83 and 84 of appellant's brief much is made of the bank's so-called equity in the lots and of the Building Company's default in re the second mortgage bonds. Contrary to counsel's assertions the bank's default ante-dated the Building Company's default, for the bank's covenant against incumbrances was as hereinbefore pointed out breached when their warranty deed was delivered.

But, passing that point, the so-called equity of the bank in these lots was subject to the liens. The bank agreed to wait until June 10, 1920, for its bonds, and before that time came knew that work had been done and materials furnished and more contracted for, which might and did give rise to liens superior to the lien of the purchase money mortgage, which was to have been. Drury was president of the Building Company and Chairman of the Board of Directors of the bank. Sheldon was secretary of the Building Company and a vice-president and director of the bank. Larson was active in all the affairs of the Building Company and the president and active head of the bank. These three men at least knew all that transpired with relation to the Building Company. As to the knowledge possessed by other directors of the bank, we refer generally to their testimony. (Tr. pp...)

On the other hand the liens of laborers and materialmen when perfected attach to the property as of the date of the commencement of the furnish-

ing of the labor and material, but also to all interests subsequently acquired and owned at the time when the lien is perfected.

> "The lien attaches to whatever interest the owner had when the work was begun, and to another or greater interest whenever acquired before the lien is enforced." 18 R. C. L. Mechanics Liens, sec. 12, p. 885.
>
> *Jarvis vs. State Bank*, 22 Col. 309; 45 Pac. 505;
>
> *Salem vs. Lane, etc. Co.*, 189 Ill. 593; 60 N. E. 37.

On pages 86 to 88 certain authorities are cited, to which it is a sufficient answer to say that the Building Company neither took subject to nor assumed and agreed to pay the $70,000 mortgage. It took an indefeasible estate in fee simple, free and clear of all incumbrances.

The $600,000 Mortgage

Uuder this head it is asserted that the Building Company owed the bank on January 15, 1921, the sum of $856,879.67. (See Appellant's Brief, p.110.) This amount is taken from the statement complied by Mr. Geiger, formerly an assistant cashier of the bank, and introduced in evidence as Exhibit 348. (Tr. p. 1235.) We shall discuss the several items making up that total in the order given in said Exhibit 348.

Item 1. "Stock $200,000." This is the purchase price of the total issue of capital stock of the Scandinavian-American Building Company, which was entered on the bank's books as an outright purchase on June 25, 1921, the stock being thereafter listed under the assets of the bank and carried on its books under the heading of "Stocks and Bonds". (See Tr. pp. 1027, 1033, 1118, 1119, 1097,1158 and 1159, Exhibits 190 and 234.) This stock passed to the Bank Commissioner when he took over the bank and was thereafter listed by him as one of the assets in his hands. (Tr. p. 1033.) The $200,000. paid by the bank therefor was passed to the credit of the Building Company (see Exhibit 190, Tr. pp. 1034 and 1035), and in part used to retire the then existing notes of the Building Company. (See Exhibit 185, Tr. p. 1026, and Exhibit 188, Tr. pp. 1032, 1114 and 1167.)

Item 2. This represents a note of the Building Company dated December 9, 1920, not December 31, 1920, as indicated in Exhibit 344. (See Exhibit 185, Tr. p. 1026. It was passed to the credit of the Building Company and used to take up two notes previously given under date of November 8, 1920, for $100,000 and $50,000 respectively. (See Exhibits 185 and 188, Tr. pp. 1026 and 1032.) The balance was used to retire the then existing overdraft of the Building Company. This item, and item 4, following which is the overdraft which

accumulated between the giving of this note and the closing of the bank on January 15, 1921, represent the only advances made to the Building Company in the shape of loans. We shall have occasion hereafter to consider the date of the inception of these loans in relation to the time of taking the assignment of the $600,000 mortgage, and the assertion of it as collateral.

Item 3. "Loan (check) $9,133.25." This item is fully explained by Exhibit 188. (Tr. p. 1030.) In the language of that exhibit, "this note represents the carrying as real estate loan No. 233, the check No. 1190 of the Scandinavian-American Building Company, dated December 31, 1920, payable to the Scandinavian-American Bank, for $9,133.25, signed by J. V. Sheldon, Sec'y, Treas.". As further appears upon said check the amount thereof was made up by calculations of interest upon the purchase price of the capital stock from June 25, 1920, to December 31, 1920, and interest upon the purchase price of the Drury lot from September 25, 1920, to December 31, 1920, and interest on $350,000 designated as 'banking house investment" from an unnamed date, apparently December 1, 1920, to December 31, 1920. (See Exhibit 350, Tr. p. 1242.)

Significantly this check-note was entered upon the bank's books at the close of the year after a visit by the Bank Commissioner on December 15, 1920. (See Tr. p. 118.) And, even more signi-

ficantly, the bank's records as to the stock purchase transaction were in no way altered. It appears always all along as an outright purchase, never as a loan. In the light of what we have said before we will let the Drury lot purchase item and the banking house investment item speak for themselves. They cannot both stand, since the $350,000 of bonds includes the $65,000 paid for the Drury lot. As to the bonds, this procedure was no doubt taken by the bank for the purpose of showing upon its books the interest which they thought had been earned during the year 1920. They unquestionably needed to get on their books all the earnings they could, but as to the propriety of the course they followed in this particular instance, we refrain from commenting.

Item 4. This has been sufficiently commented on in connection with Item 2 above.

Item 5. "Banking house, $350,000." In the confused records of the bank they continued down to as late a date as November 30, 1920, to list the property which they had previously deeded to the Building Company as among their assets. (See Exhibits 226, 227 and 349, Tr. pp. 1102, 1104 and 1238.) At the same time the Building Company was charged with interest on this item of $350,000. from December 1, 1919. (See Exhibit 35, Tr. p. 1242.) So that here, while designating this item as "banking house investment" they obviously intended the $350,000 of second mortgage bonds

which they were to receive from the Building Company as payment for the three lots upon which the new building was to be erected. Yet, strange to say, while this amount represented the consideration for the three lots, yet the $65,000 paid for the Drury lot is separately listed as Item 6 of said Exhibit 348.

Item 6. "Acct. on Genl. Ledger (Drury lot) $65,000." is a duplication in part of the preceding item. It should have been charged off because of what Mr. Larson designates as the water in the value at which lots 11 and 12 were carried by the bank prior to the conveyance thereof to the Building Company. (Tr. p. 1084.) Unfortunately the bank's financial condition did not permit of the charging off of any items, and so it continued to be carried on their books. It has no rightful existence independent of the $350,000 of bonds, and those bonds were by the terms of the agreement under which the bank was to get them to have their own security in the shape of a second mortgage, which the Supervisor is here seeking to enforce independently.

The result is that when the bank closed on January 15, 1921, there were actual advances to the Building Company evidenced by one note for $200,000 dated December 9, 1920, and an overdraft of $32,746.42. These two amounts alone can be claimed to be secured by the $600,000 mortgage. It remains to be seen how much of this in-

debtedness was existing when that mortgage was first asserted as collateral.

The assignment of the $600,000 mortgage was procured on October 7, 1920, by Mr. Larson while in Chicago, because Mr. Simpson, the mortgagee named therein, was sick, and because Mr. Larson's attorney advised him to get it to avoid trouble in the event of Simpson's death. (Tr. p. 1048.) At the time of taking it there was no thought of using it as security, and there was no direction from the Board of Directors of the bank that the assignment be obtained for the security of the bank, or for any purpose at all. In fact, after Mr. Larson secured the assignment he attempted to use that mortgage as collateral for a temporary loan, pending the completion of the building and the time when the Metropolitan Life Insurance Company would be ready to take it over and advance the full amount thereof. Neither the bank nor the Building Company authorized "the collateralization of this mortgage". (Tr. pp. 1166 and 1167.) Such are the undisputed facts. They clearly negative any intent to procure the assignment of this mortgage for the purpose of securing the bank. This mortgage was first asserted as security by the bank on December 9, 1920. On that day a memorandum note, without any signature of any officer of the Building Company and constituting Item No. 2 of Exhibit 384, was put through the bank's records by Mr. Morse, the note teller. It

was not considered by him as a note, simply as a memorandum, but the amount thereof was passed to the credit of the Building Company, and that Company's previous notes of $100,000 and $50,000 were taken up from the proceeds of such credit. (See Tr. p. 1219.) The evidence is not precise, but it fairly appears that there was at this time an overdraft in the account of the Building Company of approximately $43,000.00 (Tr. p. 1186), to which should be added the interest upon the two notes taken up by the credit derived from this $200,000 memorandum note, which amounted to $774.99; (see Exhibit 188, Tr. p. 1032) so that the net advance of new money made on the 9th of December, 1920, approximates less than $7,000.00.

Insofar then as this $600,000 mortgage was attempted to be asserted as collateral it was as collateral for an entirely pre-existing indebtedness, except possibly to the extent of $7,000.00. So far as it was collateral for a pre-existing indebtedness it was wholly void under the constitution of the state of Washington, and the construction placed thereon by the Supreme Court of that state and this court. See *Chavelle vs. Washington Trust Co.*, 226 Fed. 400, appeal dsmsd. 63 L. Ed. 414; *In re Progressive Wall Paper Co.*, 229 Fed. 494.

Supervisor is Estopped to Assert Priority for This Mortgage

The bank would be estopped to claim any priority for this mortgage, assuming it has

any validity in the hands of the bank, by reason of the representations made by the officers and agents of the bank to the various lien claimants that this particular mortgage was to provide completion money and would not be used for other purposes. These representations were made by Mr. Drury, chairman of the board of directors of the bank, and in part by Mr. Larson, president of the bank, and even though made in due course of the business of the Building Company are nevertheless binding upon the bank under the authorities cited by counsel for the Tacoma Millwork Supply Company. More particularly is this true if this court shall hold that both the Building Company and the bank are in effect one corporation under the authorities cited by Judge Stiles.

> "Where the agent of the mortgagee in a mortgage given for future advances, informed contractors that he had the money in his possession to pay for the work and that they would be paid, the mortgagee is estopped to assert a lien prior to the contractor's mechanics liens, and it is bound by the representations of its agent disbursing the money."

Schweitzer vs. Equitable Sav. & L. Assn., 98 Wash. 139; ... Pac. ...;

Bell vs. Swalwell Land Co., 20 Wash. 602; 56 Pac. 401;

Milwaukee Structural Steel Co. vs. Borun, 159 N. W. 811.

The Bank Supervisor or Commissioner is in this regard in the exact situation of the bank. He has no different rights, and the parties he represents have no superior equities over the lien claimants.

The $600,000 Mortgage is Inferior to the Lien Claims Because There Was No Delivery and Acceptance Thereof Until After the Lien Claims Had Attached

The advances made by the bank were voluntary, not the result of any duty or obligation imposed by contract or otherwise, and so far as they were claimed by the bank to be secured by this mortgage were all made subsequent to the time when the liens had attached, and made with knowledge on the part of the bank officers that such liens had attached. The mortgage in the hands of the bank, and therefore in the hands of the Bank Commissioner, if security at all for the advances made by the bank or any of them, is inferior to the several liens. See *Schaefer vs. Reilly*, 50 N. Y. 61; *Hewson vs. Herzog*, 54 N. W. 751; *Finlayson vs. Crooks*, 49 N. W. 398; 27 Cyc 239, 240; *Melon vs. St. Louis Union Tr. Co.*, 225 Fed. 693.

In this connection we call the court's attention to *Andersonian Inv. Co. vs. Jones*, 104 Wash. 142, holding:

> "Under Remington's Code (section 1132) giving preference to mechanics liens over any

mortgage which may attach subsequently to the time of the commencement of the labor, an architect's lien upon a building is superior to a mortgage for future advances, where the mortgagee had previous notice that the architect had already commenced to perform labor upon the plans and specifications and would continue as architect and superintendent of construction."

Under the doctrine of *Lipscomb vs. Exchange Nat'l Bank,* the lien of the architect is not established unless the plans and specifications which he prepares are actually used for the construction building. Consequently the notice in the Andersonian Company case which was sufficient to postpone the mortgage was notice merely of an inchoate right to a lien, notice of the performance of preliminary acts which if followed up under the contract there existing, would give right to a lien. In this case the bank and the Bank Commissioner are charged with the same notice so far as the lien claim of the complainant is concerned. The bank had notice prior to the execution of the Simpson mortgage and prior to its recording of the McClintic-Marshall Company contract, and of the fact that the McClintic-Marshall Company had commenced work thereon. The work which it had thus commenced was the beginning of the furnishing of the material which is the foundation of the complainant's claim for a lien herein. Further it is not

disputed that actual delivery of materials to the building premises had been made both by the McClintic-Marshall Company and the other lien claimants long prior to the assignment of the Simpson mortgage.

Moreover Simpson, the mortgagee named in the mortgage, was a broker whose services had been elicited by the bank or the Building Company to procure the placing of this mortgage because of work of the same character successfully completed by him in Seattle shortly before. It was not contemplated that he would advance a dollar on the mortgage. Neither was he, at the time that the mortgage was made, the trustee of said mortgage for any particular person, firm or corporation. The mortgage and note were made to him for convenience while he was the agent of the bank and the Building Company, and to all intents and purposes they must be treated and have the same effect as though the note and mortgage were made to the Building Company itself. They did not become effective or a completed transaction until they were delivered and accepted by a third party, who was to advance the money thereon.

> "An indispensable requisite to the operation of a mortgage is delivery. To constitute delivery the mortgage must pass under the power of the mortgagee or some person for his use with the consent of the mortgagor, the

intent of the latter that there should be a delivery being the decisive factor * * * Not only must the mortgage be delivered by the mortgagor, but it must be accepted by the mortgagee, and until accepted it can have no effect as a lien. Thus where a mortgage is delivered for the use of the mortgagee but without his knowledge to the recorder to be recorded it must be held subordinate to attachments levied subsequent to the delivery but prior to acceptance by the mortgagee, his acceptance not relating back to the original delivery."

19 R. C. L. Mortgages, sec. 52.

Parmelee vs. Simpson, 18 Law. Ed. 542; 72 U. S. 81.

The facts are parallel to the present case. The opinion says:

"The placing of the deed on record was Bovey's (the grantor) own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed and delivery of it to the register for that purpose does not vest title in the grantee. (Citing cases.)

"If Simpson had agreed to accept the deed in liquidation of his debt and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it

is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage; and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it encumbered with the lien of the mortgage."

Rogers vs. Head's Iron Factory, 70 N. W. 532; 37 LRA 429 Neb.).

The case involves a chattel mortgage, but otherwise is parallel to the instant case. The syllabus is as follows:

"A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the direction of the mortgagor, it was filed for record, and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery, but not so as to persons who have acquired title to an interest in, or a lien upon, the property before the actual acceptance by the mortgagee."

See also opinion, 37 L R A pp. 433 and 434.

First National Bank vs. McCreery, 132 Pac. 718, affirmed on rehearing 134 Pac. 1180.

"The delivery and acceptance of the mortgage are essential to its validity. Without

these there is no mortgage, but only an attempt at one, or a proposition to make one. It is true, however, that although there may be no valid delivery of a mortgage at the time of its execution, a subsequent delivery will avail against those who have not in the meantime acquired rights to the property or interest in it. But it is otherwise as to a creditor of the mortgagor who has acquired an interest in the property during such time. 1 Jones on Chattel Mortgages (5th Ed.) sec. 104.

* * *

"(4) 'Acceptance' is defined by Mr. Anderson in his dictionary as follows: 'A receiving—with approval, or conformably to the purpose of a tender or offer'. The mortgage was signed by Officer without the knowledge or consent of McPherson, the mortgagee, and when the latter refused to ratify the transaction there was no mortgage. As was said by Mr. Justice Thayer in *Shirley vs. Burch*, 16 Ore. 83, at page 92, 18 Pac. 351, at page 356 (8 Am. St. Rep. 273) in speaking of the essentials of a mortgage: 'One person cannot make a contract with another without the knowledge and consent of the latter; it must be a mutual agreement between the contracting parties. A contract in form, with a person who is a stranger to it, stands upon the same footing as an assumed contract with a fictitious person. It would lack

the essential elements of a contract—the meeting of the minds of the parties.'

"(5) A delivery of a mortgage is not complete without an acceptance by the mortgagee, which is essential to make a mortgage a valid instrument. 6 Cyc. 1009. The fact that the mortgage was recorded does not constitute a delivery and acceptance where there was none in fact. It is admitted that the mortgage was recorded without the knowledge or consent of the mortgagee. The recording therefore would not amount to a delivery. Jones on Chattel Mortgages (5th Ed.) sec. 106, states the rule as follows: 'The delivery of a mortgage to the recorder, or the filing it in the proper office by the mortgagor, is not in itself such a delivery as will operate to give the mortgagee any title under it, prior to his actual acceptance of the security.' See also *Bogard vs. Barham*, 56 Or. 269, 277, 108 Pac. 214, 217.

"(6) Where a creditor once refuses to accept a mortgage, he cannot afterwards accept it without the debtor's consent. 1 Jones on Mortgages, (6th Ed.) sec. 85. In other words, when the proposition to mortgage is rejected, the entire matter is dead and cannot be revived without a new proposition, a new agreement, a new meeting of the minds." (132 Pac. p. 720.)

See also *Johnson vs. North Star Lbr. Co.*, 206 Fed. 624, (C. C. A. 9th Circuit) following *Parmelee vs. Simpson, supra; National State Bank vs. Morse*, 34 N. W. 803 (Iowa); *Cobb vs. Chase*, 6 N. W. 208 (Iowa); see also cases cited in *6 Roses Notes*, pp. 153 to 155. *Hibbard vs. Smith*, 4 Pac. 473 Cal.).

We also call the court's attention on this point to the fact that the bank is not a holder for value of this mortgage. See *Connecticut Invest. Co. vs. Dimick*, 105 Wash. 265.

Accordingly we join with Mr. Holt and Judge Stiles in asserting that neither of the three mortgages is entitled to recognition in this proceeding and submit that the decree of the District Court with respect thereto should be in all things affirmed.

Respectfully submitted,

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